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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

CALEB L. MCGILLVARY,

Plaintiff,

v.

NETFLIX, *et al.*,

Defendants.

Case No. 2:23-cv-01195-JLS-SK

**Defendant Sinclair Television of  
Fresno, LLC's Notice of Motion and  
Motion to Dismiss Plaintiff's First  
Amended Complaint; Memorandum  
of Points and Authorities**

Hearing Date: March 29, 2024  
Hearing Time: 10:30 a.m.

Before the Hon. Josephine L. Staton

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on March 29, 2024, at 10:30 a.m., or as soon thereafter as the matter may be heard in the above-titled Court, located at First Street U.S. Courthouse, 350 West 1st St., Los Angeles, CA 90012, Courtroom 8A, 8th Floor, Defendant Sinclair Television of Fresno, LLC ("KMPH"), incorrectly sued as KMPH Fox News, will and hereby does move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss all claims asserted against KMPH in Plaintiff Caleb McGillvary's First Amended Complaint ("FAC").

Specifically, the FAC against KMPH should be dismissed for the following reasons:

- McGillvary's claims for constructive trust, accounting, and equitable estoppel fail because there are no such causes of action recognized by California law;
- These claims are also are preempted by the Copyright Act;
- Even if it were not preempted, McGillvary's claims would fail because he does not allege that KMPH is a joint owner in the copyrights to the works at issue;
- McGillvary's claim for declaratory relief, pleaded in his Prayer for Relief, fails because McGillvary does not and cannot allege facts entitling him to ownership of copyrights to those works; and
- McGillvary's alternative claim for relief in the form of a declaration that he is at least a co-owner of the copyrights to the works at issue, pleaded in his Prayer for Relief, fails because it is unsupported by any allegations that both he and KMPH intended to jointly create the works.

KMPH's motion to dismiss is supported by this Notice of Motion, the accompanying Memorandum of Points and Authorities, all papers and pleadings on file in this action, all matters of which the Court may take judicial notice, and such other and further material and argument as may be presented to the Court.

*[signature block on next page]*

1 Dated: February 16, 2024

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. Introduction

Shortly after rocketing to fame a decade ago as “Kai the Hatchet-Wielding Hitchhiker” for his role in violently stopping another man from attacking people in California, Plaintiff Caleb McGillvary (“Plaintiff” or “McGillvary”) beat an elderly man to death in New Jersey. Now he sues a raft of defendants who chronicled, in real time and in a recent documentary, McGillvary’s exhilarating rise and fall for alleged and various wrongs.

McGillvary’s dense, 99-page First Amended Complaint asserts numerous causes of action under various theories against 18 named defendants and 14 Doe defendants. One of these defendants is Sinclair Television of Fresno, LLC (“KMPH”), incorrectly sued as KMPH Fox News. It was KMPH that conducted and broadcast the February 2013 interview that shot McGillvary to fame and the follow-up four days later when a KMPH crew met with Plaintiff to interview him about his newfound celebrity.

While the First Amended Complaint broadly alleges an intricate conspiracy to exploit McGillvary’s fame and deprive him of its fruits, the claims against KMPH are few and straightforward. McGillvary alleges that he holds the copyrights in the “performance” captured in the KMPH interviews and in the footage itself. As such, he contends, those copyrights are in a “constructive trust” for his benefit and he is entitled to both an “equitable accounting,” from KMPH, of revenue derived from those copyrights and a declaration, by the Court, that he is the sole owner of the copyrights in the works relating to the KMPH interviews.

The First Amended Complaint against KMPH should be dismissed for failure to state a claim upon which that requested relief can be granted.

*First*, McGillvary’s state law claims suffer multiple, fatal defects. For one, California does not recognize a standalone cause of action for constructive trust, accounting, or equitable estoppel. Further, even if the state law claims were

1 sufficiently pleaded, they are preempted by the Copyright Act. Finally, to the extent  
2 it is not preempted, McGillvary's claim for an equitable accounting may be asserted  
3 only by a joint owner of a copyright against its co-owner, and McGillvary alleges  
4 that KMPH has no such ownership in the works at issue.

5 *Second*, McGillvary fails to plead facts that would entitle him to the  
6 declaratory relief he seeks. McGillvary does not and cannot allege facts entitling  
7 him to ownership of copyrights to those works. It was KMPH, not him, who fixed  
8 any "performance" by him into a tangible, copyrightable form. McGillvary also fails  
9 to allege facts establishing that he, in fact, controlled the performances. As such, it  
10 is KMPH who owns any copyrights to the works relating to the KMPH interviews.  
11 Finally, to the extent McGillvary claims entitlement, in the alternative, to a  
12 declaration that he is at least a co-owner of the copyrights to the works at issue, that  
13 claim fails because it is unsupported by any allegations that both he and KMPH  
14 *intended* to jointly create the works.

15 Accordingly, the First Amended Complaint against KMPH fails as a matter of  
16 law and should be dismissed.

## 17 **II. Background<sup>1</sup>**

### 18 **A. The Underlying Incident**

19 McGillvary was hitchhiking on February 1, 2013, when the driver of the car  
20 in which he was riding crashed into a group of power line workers. First Am.  
21 Compl. ("FAC") ¶¶ 2(a), 7. The driver, Jett McBride, then exited the vehicle and  
22 began attacking a man whom he had hit with the car, as well as a woman who had  
23 come to McBride's victim's aid. *Id.* ¶ 2(b). McGillvary thwarted the attack by  
24 swinging "his camping hatchet with force 3 times" into McBride's head. *Id.* ¶¶ 1,

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25  
26 <sup>1</sup> For purposes of this motion only, McGillvary's well-pleaded allegations of fact are  
27 accepted as true. *See Karasek v. Regents of the Univ. of Cal.*, 956 F.3d 1093, 1104  
28 (9th Cir. 2020).

1 2(c). After speaking with police officers, McGillvary was released from custody  
2 and allowed to leave. *Id.* ¶¶ 1, 2(i), 7.

3 **B. The First KMPH Interview**

4 McGillvary was leaving the scene when a reporter and camera operator from  
5 KMPH approached him. *Id.* ¶¶ 1, 7. The KMPH journalists proceeded to interview  
6 McGillvary about the incident, and he “described the events” that had occurred,  
7 “which included his use of a hatchet to subdue the attacker.” *Id.* ¶¶ 1, 7. At the  
8 beginning of the interview, McGillvary was asked “What happened today?” and he  
9 proceeded to recount his interactions with McBride, the crash and aftermath, and his  
10 hitting McBride with a hatchet. *See* Cate Decl., Ex. 1 at 0:01-1:42. In describing  
11 his use of the hatchet, McGillvary swung his arm and said “smash, smash, smash.”  
12 *Id.* at 1:35-42. The reporter then posed a series of other questions, including about  
13 McGillvary’s name and background, how he had gotten in the car, what happened  
14 after McGillvary hit McBride with the hatchet, whether he was questioned by  
15 police, what he was going to do next, and whether McGillvary would do it again.  
16 *Id.* at 1:43-5:49. McGillvary answered those questions. *Id.*

17 The reporter and camera operator were holding equipment identifying KMPH  
18 as the station for which they worked. FAC ¶ 7. The interview was filmed by the  
19 camera operator using the KMPH camera and the footage was turned over to the  
20 station. *Id.* ¶ 9. KMPH incorporated the footage into a standard news segment on  
21 the incident and aftermath, featuring multiple subjects, and aired on the night’s news  
22 broadcast. *Id.* ¶ 10; *see also* Cate Decl., Ex. 2. The interview “went viral,” leading  
23 to McGillvary becoming “widely known.” FAC ¶ 1.

24 **C. The Second KMPH Interview**

25 A few days later, on February 5, 2013, a KMPH news crew contacted  
26 McGillvary and interviewed him about his newfound fame. *See id.* ¶ 12; *see also*  
27 Cate Decl., Ex. 3. In addition to asking McGillvary questions about his celebrity  
28 and background, the KMPH crew filmed footage of McGillvary on a skateboard

1 and, in footage later posted online, playing a song at a guitar shop. *See* FAC ¶ 12;  
2 *see also* Cate Decl., Ex. 4.

3 Again, the interview was recorded by the KMPH employees and the footage  
4 was provided by them to the station. FAC ¶ 13. This footage also used as part of a  
5 news broadcast. *Id.* ¶ 14.

6 KMPH did not pay McGillvary for agreeing to either interview or for  
7 appearing in the footage. *See id.* ¶¶ 10, 14. KMPH and McGillvary had no  
8 contractual relationship at all. *Id.*

9 **D. The New Jersey Murder and Documentary**

10 A few months after he shot to fame, McGillvary murdered a 74-year-old man  
11 in New Jersey on May 12, 2013. *See State v. McGillvary*, No. A-4519-18, 2021 N.J.  
12 Super. Unpub. LEXIS 1651, at \*\*1-2 (N.J. App. Div. May 12, 2021). McGillvary  
13 was convicted of first degree murder and sentenced to fifty-seven years of  
14 imprisonment in May 2019. *Id.* at \*1. While McGillvary appealed his conviction,  
15 *see id.*, he and others were considering a documentary about his “life story” in  
16 which he would appear, *see* FAC ¶¶ 65-67. Ultimately, in January 2023, a  
17 documentary produced by Defendant Raw TV was released by Defendant Netflix,  
18 Inc. *Id.* ¶ 111; *see also* <https://www.netflix.com/watch/81436777>.

19 **E. This Action**

20 McGillvary filed this action a few weeks after the documentary’s release. *See*  
21 ECF No. 1. He filed the current operative pleading, the First Amended Complaint  
22 on May 22, 2023. ECF No. 18. A motion for leave to file a Second Amended  
23 Complaint, to which all Defendants who have appeared have indicated their non-  
24 opposition, was filed on January 30, 2024, and remains pending. *See* ECF Nos. 115,  
25 122.

26 In the current complaint, McGillvary claims to have registered four works  
27 concerning his interviews with KMPH (the “Interview-Related Works”):  
28

1. A dramatic work created during his interview on February 1, 2013 titled “Smash, Smash, SUH-MASH!” (PA 2-398-664). *See* FAC ¶ 8 & Ex. A.
2. The words spoken during the February 1, 2013 interview, also titled “Smash, Smash, SU-MASH!” (PA 2-398-110). *See* FAC ¶ 8 & Ex. B.
3. The lyrics and music performed during the February 5, 2013 interview, which he titled “Movement” (SR 953-342). *See* FAC ¶ 12 & Ex. C.
4. A motion picture work “Movement” which is derivative of the lyrics and music work under the same name (PA 2-396-377). *See* FAC ¶ 13 & Ex. D.<sup>2</sup>

On January 16, 2024, this Court extended KMPH’s deadline to respond to the First Amended Complaint to February 16, 2024. ECF No. 80.

### III. Argument

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint’s allegations “must be enough to raise a right to relief above the speculative level,” and the plaintiff must plead “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [plaintiff’s claim].” *Twombly*, 550 U.S. at 555-56 (2007). Among other things, “a plaintiff’s obligation to provide the ‘grounds ‘ for his ‘entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Abrot v. Mercedes-Benz USA, LLC*, 2023 U.S. Dist. LEXIS 128554, at \*3 (C.D. Cal. June 26, 2023) (quoting *Twombly*, 550 U.S. at 555).

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<sup>2</sup> Plaintiff also claims to own the copyright in various other works. *See* FAC ¶¶ 138-52. These works do not involve KMPH.

On a motion to dismiss, a court may consider “only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). “Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s claim.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Though KMPH’s interview with Plaintiff and the resulting news broadcasts are not attached to the First Amended Complaint, they are referenced extensively in the First Amended Complaint and form the basis of McGillvary’s claim against KMPH. See FAC ¶¶ 7-14. They are therefore incorporated by reference. See *Mills v. Netflix, Inc.*, 2020 U.S. Dist. LEXIS 17797, at \*4 (C.D. Cal. Feb. 3, 2020) Alternatively, as demonstrated in the attached Request for Judicial Notice, the Court may take judicial notice of these materials. See *Newt v. Twentieth Century Fox Film Corp.*, 2016 U.S. Dist. LEXIS 98308, at \*\*5-7 & n.4 (C.D. Cal. July 27, 2016) (taking judicial notice of allegedly infringed and infringing work on motion to dismiss copyright action); *Campbell v. Walt Disney Co.*, 718 F. Supp. 2d 1108, 1111 n.3 (N.D. Cal. 2010) (same).

In a copyright action, the “works themselves supersede any ‘any contrary allegations, conclusions or descriptions of the works contained in the pleadings.’” *Chey v. Pure Flix Entm’t LLC*, 2017 U.S. Dist. LEXIS 220228, at \*10 (C.D. Cal. Feb. 10, 2017) (quoting *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010)).

**A. The Only Claims Apparently Pleaded Against KMPH in the First Amended Complaint Fail.**

While the First Amended Complaint is not entirely clear on this point, it appears that Plaintiff intends to bring two state law claims against KMPH: (1) a claim for constructive trust, equitable accounting, and disgorgement, and (2) a claim for equitable estoppel. See FAC ¶¶ 136-37, 181, 248. These claims for two separate



1 reasons. Because it is inconsistent with the factual allegations of the complaint,  
2 Plaintiff cannot avoid this result by contending that KMPH and he are co-owners.

3 **1. These are not independent causes of action.**

4 As an initial matter, there is no such thing as a cause of action for constructive  
5 trust or accounting under California law. These are remedies, not independent  
6 claims for relief. *See Jordan v. Star Trak Entm't, Inc.*, 2010 U.S. Dist. LEXIS  
7 149295, at \*9 (C.D. Cal. May 13, 2010) (rejecting both accounting and constructive  
8 trust as independent claims); *Vigdor v. Super Lucky Casino, Inc.*, 2017 U.S. Dist.  
9 LEXIS 97681, at \*\*25-26 (N.D. Cal. June 23, 2017) (discussing cases for both  
10 propositions).

11 Similarly, to the extent McGillvary intends to plead a claim for “equitable  
12 estoppel,” this also is not an independent claim. Equitable estoppel is a “defensive[  
13 only” mechanism by which one party bars another from contradicting its prior  
14 statement or conduct. *See, e.g., Moncada v. W. Coast Quartz Corp.*, 221 Cal. App.  
15 4th 768, 782 (2013). As such, it is also not a standalone cause of action under  
16 California law. *Id.*

17 The Court should accordingly dismiss these counts.

18 **2. The state law claims are preempted by the Copyright Act.**

19 Even if McGillvary could state an independent cause of action for  
20 constructive trust, accounting or equitable estoppel—and for the reasons stated  
21 above he cannot—these claims would be preempted by the Copyright Act. A  
22 central tenet of U.S. copyright law is that state common law or statutory claims that  
23 (1) come within the “subject matter” of a copyright and (2) are “equivalent to” any  
24 of the exclusive rights within the general scope of the Copyright Act are preempted.  
25 17 U.S.C. § 301(a); *see also, e.g., Del Madera Props. v. Rhodes & Gardner, Inc.*,  
26 820 F.2d 973, 976-77 (9th Cir. 1987). McGillvary’s claims meet both prongs of this  
27 test.

1 “[T]he subject matter of copyright encompasses ‘original works of authorship  
2 fixed in any tangible medium of expression, now known or later developed, from  
3 which they can be perceived, reproduced, or otherwise communicated, either  
4 directly or with the aid of a machine or device.’” *Close v. Sotheby’s, Inc.*, 894 F.3d  
5 1061, 1069 (9th Cir. 2018) (quoting 17 U.S.C. § 102(a)). McGillvary bases his  
6 claim on musical, dramatic, choreographic, and motion-picture works, all within the  
7 subject matter of the Copyright Act. *See* FAC ¶¶ 8, 12-13; 17 U.S.C. §§ 102(a).  
8 Indeed, he contends that he holds a copyright in each of these works and has  
9 registered them with the Copyright Office.

10 Under the second prong, “Section 106 provides a copyright owner with the  
11 exclusive rights of reproduction, preparation of derivative works, distribution, and  
12 display. To survive preemption, the state cause of action must protect rights which  
13 are qualitatively different from the copyright rights.” *Del Madera Props.*, 820 F.2d  
14 at 977. Plaintiff alleges that KMPH owes him an accounting “for any use or  
15 resulting revenue or appreciation of copyrights” in the works at issue. FAC ¶ 11.  
16 While this is somewhat unclear, it appears that McGillvary is seeking any revenue  
17 gained by KMPH for exploiting the works without his permission. Claims where  
18 Plaintiff alleges that the defendant “used his copyrighted work and then retained  
19 profits” are equivalent to rights under copyright law. *Dennis v. Nike, Inc.*, 2022  
20 U.S. Dist. LEXIS 236356, at \*8 (C.D. Cal. Nov. 18, 2022); *see Worth v. Universal*  
21 *Pictures, Inc.*, 5 F. Supp. 2d 816, 823 (C.D. Cal. 1997) (“profits created from [a  
22 copyrighted work] are the damages sought from the [copyrighted work]’s  
23 unauthorized reproduction and distribution and are subsumed within federal  
24 copyright law”).

25 The state law claims should be dismissed as preempted.  
26  
27  
28



3. **To the extent Plaintiff intended to plead an equitable claim related to unjust enrichment, he has not pleaded allegations consistent with such a claim.**

The Ninth Circuit has allowed a limited class of state law claims in this context related to the duty of a “co-owner of a copyright” to “account to other co-owners for any profits he earns from licensing or use of the copyrights.” *See Oddo v. Ries*, 743 F.2d 630, 633 (9th Cir. 1984). “[T]he duty to account does not derive from the copyright law’s proscription of infringement. Rather, it comes from equitable doctrines relating to unjust enrichment and general principles of law governing the rights of co-owners.” *Id.* (internal marks omitted).

The facts as pleaded in the First Amended Complaint are inconsistent with such a claim. First, Plaintiff expressly claims that he is the owner of each of the works at issue, not a co-owner. *See* FAC ¶¶ 8, 10, 12-14, 154-157; *see also id.* ¶ 181. McGillvary contends that KMPH was a mere licensee. *See id.* ¶¶ 10, 14. Second, co-owners have the independent right to use or license the photograph. *Oddo*, 743 F.2d at 633. The premise of Plaintiff’s claims against the other Defendants is that only he, and not KMPH, could grant a license for the use of these works.

While a licensee may have a duty to account to his licensor, that exists “only to the extent that the terms of the license requires such an accounting.” 1 NIMMER ON COPYRIGHT § 6.12(C)(3) (2023). Plaintiff does not allege that any license he granted to KMPH required an accounting, and indeed, he contends that KMPH’s license “was specifically limited to broadcast on KMPH, for news reporting purposes and not for commercial use.” FAC ¶¶ 10, 14.

For each of these reasons, Plaintiff’s claims must be dismissed.

**B. McGillvary Has Failed to Plead Sufficient Grounds For Declaratory Relief.**

McGillvary also seeks declaratory relief, namely a declaration that he is the sole author of or, in the alternative, a co-author of the four Interview-Related Works.

1 FAC ¶¶ 242-44. The claim for declaratory relief is also legally deficient and should  
2 be dismissed.

3 **1. McGillvary does not allege sole authorship in the works at**  
4 **issue.**

5 With respect to both interviews, Plaintiff makes a variety of allegations  
6 attempting to demonstrate that he is their sole author. These allegations, which  
7 largely consist of legal conclusions as opposed to allegations of fact, are insufficient  
8 to adequately support his ownership of any of the copyrights to the works at issue.

9 **(a) McGillvary is not the author of the performances or**  
10 **the KMPH footage.**

11 The copyright in a work “vests initially in the author or authors of the work.”  
12 17 U.S.C. § 201(a). As a “general rule,” “the author is the party who actually  
13 creates the work, that is, the person who translates the idea into a fixed tangible  
14 expression entitled to copyright protection.” *Cnty. for Creative Non-Violence v.*  
15 *Reid*, 490 U.S. 730, 737 (1989); *see NFL’s Sunday Ticket Antitrust Litig. v. DirecTV,*  
16 *LLC*, 933 F.3d 1136, 1154 (9th Cir. 2019) (“[I]n the absence of an agreement  
17 otherwise, the person or company that creates the telecast is the ‘author’ of the  
18 telecast for the purposes of copyright law.”). In turn, a copyrightable “work is  
19 ‘fixed’ in a tangible medium of expression” only when it is captured in a copy that is  
20 “sufficiently permanent or stable to permit it to be . . . communicated for a period of  
21 more than transitory duration.” 17 U.S.C. § 101.

22 The FAC itself acknowledges that it was KMPH, not McGillvary, who fixed  
23 all the alleged works in tangible form. McGillvary alleges that KMPH employees  
24 “stopped” him as he was leaving the scene of the incident, and “recorded him” using  
25 KMPH controlled- and operated-equipment. *See* FAC ¶¶ 1, 7, 12. It was KMPH,  
26 not McGillvary, who controlled the completed footage at the conclusion of those  
27 interviews. *See id.* ¶¶ 9, 13. And, it was KMPH, not McGillvary, who published  
28 the completed footage in its news broadcast. *See id.* ¶¶ 10, 14.

Plaintiff was thus only an interview *subject*. He played no role in what is relevant to ownership of a copyright, the *fixation* of the works. He accordingly cannot be the author of any of them, much less in the footage that KMPH exclusively controlled. *See Garcia v. Google, Inc.*, 786 F.3d 733, 744 (9th Cir. 2015) (en banc) (rejecting claim that actress was author of work where film crew “fixed [her] performance in the tangible medium”); *see also LMNO Cable Grp. v. Discovery Commc’ns*, 2018 U.S. Dist. LEXIS 236321, at \*13 (C.D. Cal. Jan. 11, 2018) (finding that stars of reality television program were not responsible for fixing program into tangible expression).

For this reason alone, McGillvary fails to allege ownership in the KMPH footage.

**(b) McGillvary does not adequately allege “control” over the performances or KMPH footage.**

Even if McGillvary were to contend that the *fixation* of the works was done at his direction, which the FAC does not allege, he still has not plausibly alleged that he is an author of them for copyright purposes. An author is “the person to whom the work owes its origin and who superintended the whole work, the ‘master mind.’” *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000). He or she “‘superintends’ the work by exercising control,” and this “will likely be a person ‘who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be—the man who is the effective cause of that,’ or ‘the inventive or master mind’ who ‘creates, or gives effect to the idea.’” *Id.* at 1234. This is true even if others make important creative contributions. *Id.* at 1233.

McGillvary mirrors this language in this complaint, *see* FAC ¶ 8 (stating, with respect to the February 1 interview, that he “had superintendence over the work,” “put[] the persons in position and arrang[ed] the place where people would be,” and was the “inventive mastermind”); *see also id.* ¶ 12 (similar allegations regarding

1 February 5 interview). However, these are bare legal conclusions, “not entitled to  
2 the assumption of truth.” *Ashcroft*, 556 U.S. at 579.

3 To the extent there are plausible allegations of relevant fact in the First  
4 Amended Complaint, they reveal a lesser role for McGillvary. He concedes that the  
5 February 1 interview occurred after he was “approached by” KMPH employees and  
6 that they “elicited a dramatic performance from Plaintiff . . . in which Plaintiff  
7 described, among other things, the events of February 1.” FAC ¶ 7. Similarly, he  
8 alleges that the February 5 interview occurred after a KMPH employee “contacted  
9 Plaintiff and asked him to meet with him.” *Id.* ¶ 12. In other words, in both  
10 instances, and as he admits, McGillvary was approached by Sinclair’s reporter and  
11 answered a series of questions posed to him. The interview videos themselves show  
12 the same. *See* Cate Decl., Exs. 1-4.

13 Meanwhile, McGillvary does not allege that he ever expressed any intention  
14 to KMPH that he intended to control any “performance” or the station’s footage  
15 capturing it. Instead, he alleges that he expected compensation for his performance.  
16 FAC ¶ 9. Critically, however, he does not allege that he relayed that expectation to  
17 KMPH, and he admits that he was never paid by KMPH and that he never entered  
18 into any sort of “contract or agreement.” *Id.* ¶ 10.

19 The allegations in First Amended Complaint thus paint only one picture:  
20 McGillvary was an interview *subject*, not an *author* of any performance.

21 A court rejected virtually identical claims in *Taggart v. WMAQ Channel 5*  
22 *Chicago*, 2000 U.S. Dist. LEXIS 19499 (S.D. Ill. Oct. 30, 2000). There, the  
23 plaintiff claimed a copyright to his “performance” in an interview he consented to  
24 give a local television. *Id.* at \*7. The district court dismissed the claim, reasoning  
25 that even if the plaintiff’s comments were “diverse, distinctive, aberrant, eccentric,  
26 odd or bizarre . . . those expressions simply do not rise to the level of a literary or  
27 intellectual creation that enjoys the protection of copyright law.” *Id.* at \*16.  
28 Moreover, the court reasoned that the plaintiff’s “comments during the interview

1 were unprepared and spontaneous responses,” and the interview proceeded in a  
2 “question and answer format, where banter and informal exchanges are likely to  
3 occur.” *Id.*

4 Indeed, as the *Taggart* court recognized, if copyright “afford[ed] such  
5 protection to materials gathered in the daily task of the news reporter,” it “would  
6 essentially bring the industry to a halt.” *Id.* Other courts have rightly agreed with  
7 that result. *See, e.g., Falwell v. Penthouse Int’l, Ltd.*, 521 F. Supp. 1204, 1208  
8 (W.D. Va. 1981) (finding, with respect to common-law copyright claim, that  
9 “Plaintiff cannot seriously contend that each of his responses in the published  
10 interview setting forth his ideas and opinions is a product of his intellectual labors  
11 which should be recognized as a literary or even intellectual creation”); *Current*  
12 *Audio v. RCA Corp.*, 71 Misc. 2d 831, 834-35 (N.Y. Sup. Ct., N.Y. Cnty. 1972)  
13 (finding, with respect to common law claim, that to hold “that one who has freely  
14 and willingly participated in a public press conference has some property right  
15 which supersedes the right of its free dissemination and permits such party to  
16 control or limit its distribution would constitute an impermissible restraint upon the  
17 free dissemination of thoughts, ideas, newsworthy events, and matters of public  
18 interest”).

19 Accordingly, the First Amended Complaint fails as a matter of law to allege  
20 that McGillvary has a copyright in the “performances” captured in the KMPH  
21 Footage.

22 **2. McGillvary does not allege any basis for declaring that any of**  
23 **the works are “joint works” in which he may claim co-**  
24 **ownership.**

25 In his plea for declaratory relief, McGillvary seeks “in the alternative,” a  
26 declaration that he is a “co-author of the motion picture works” constituting the  
27 February 1 and February 5 interview. FAC ¶ 243. Here, however, he fails to state a  
28 claim upon which relief may be granted because he fails to allege that he created  
any “joint work” with KMPH.

1 In particular, “a person claiming to be an author of a joint work must prove  
2 that both parties intended each other to be joint authors.” *Aalmuhammed*, 202 F.3d  
3 at 1234; *see also* 17 U.S.C. 101 (“A ‘joint work’ is a work prepared by two or more  
4 authors *with the intention* that their contributions be merged into inseparable or  
5 interdependent parts of a unitary whole.”); *Ford v. Ray*, 130 F. Supp. 3d 1358, 1363  
6 (W.D. Wash. 2015) (dismissing co-authorship claim where “Plaintiff has not alleged  
7 that the parties shared a mutual intent that they be co-authors, nor has he identified  
8 any objective manifestations of such an intent”). McGillvary has claimed the exact  
9 opposite of co-authorship in the works at issue, insisting (incorrectly) that he  
10 intended to create the works and retain sole ownership of the copyrights to them.  
11 FAC ¶¶ 7, 12. Crediting those allegations as true, they necessarily defeat any claim  
12 that he co-owns with KMPH the copyright to the works.

13 In addition, the premise of McGillvary’s infringement claims against the other  
14 defendants in this case is that he “expressly prohibit any use of his copyright-  
15 protected works,” including the KMPH footage. *See* FAC ¶¶ 154-56, 163. As  
16 discussed above, a co-author has the ability to exploit a work and grant licenses. If  
17 KMPH and McGillvary were co-authors of the works, he would have no ability to  
18 dispute KMPH’s licensure of them.

19 **IV. Conclusion**

20 For the foregoing reasons, the Court should dismiss the First Amended  
21 Complaint against KMPH.

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1 Dated: February 16, 2024

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22 **Certificate of Compliance**

23 The undersigned, counsel of record for Defendant Sinclair Television of  
24 Fresno, LLC, certifies that the foregoing Memorandum of Points and Authorities  
25 contains 4,439 words, which complies with the word limit of L.R. 11-6.1.

26 Dated: February 16, 2024

/s/ Matthew S.L. Cate  
27 Matthew S.L. Cate  
28



**PROOF OF SERVICE**

I am a resident of the State of California, over the age of 18 years, and not a party to this action. My business address is Ballard Spahr LLP, 1909 K Street, NW, 12th Floor, Washington, D.C., 20006-1157.

On February 16, 2024, I electronically filed the foregoing **Defendant Sinclair Television of Fresno, LLC's Notice of Motion and Motion to Dismiss Plaintiff's Second Amended Complaint and accompanying Memorandum of Points and Authorities** with the Court through its CM/ECF system, which will provide notice to counsel of record in this case, and I caused the same to be served via U.S. Mail to:

Caleb L. McGillvary  
#1222665/SBI #102317G  
New Jersey State Prison  
P.O. Box 861  
Trenton, NJ 08625

Dated: February 16, 2024

/s/ Matthew S.L. Cate

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